Central Law Journal.

ST. LOUIS, MO., JULY 27, 1917.

JURISDICTION OF FEDERAL COURTS IN ADMIRALTY EXCLUDING WORKMEN'S COMPENSATION LAWS.

It was held by New York Court of Appeals in Jensen v. Southern Pacific Co., 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403 Ann. Cas. 1916B, 276, that Employers' Liability Act, maritime employes came under the provisions of the Workmen's Compensation Act of that state. To the same effect also is Walker v. Clyde Steamship, 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87. These two cases were reversed by U. S. Supreme Court. Southern Pac. Co. v. Jensen, 37 Sup. Ct. 524; Clyde Steamship Co. v. Walker, 37 Sup. Ct. 545.

The New York court held by unanimous decision that there was not in the Workmen's Compensation Act any direct burden on interstate commerce and, therefore, there was no objection to the Act on that score. Additionally, this court said in the Walker case that: "The jurisdiction peculiar to admiralty, which cannot be exercised by state courts is the jurisdiction to enforce maritime liens by proceedings in rem. The remedy provided by the Workmen's Compensation Act is a substitute for the common law remedy. It is in no sense a proceeding in rem to enforce a maritime lien, and may, therefore, exist concurrently with the remedy in admiralty."

The reversing opinion in the U. S. Supreme Court was in the Jensen case and for it there was a bare majority of five to four, the dissentients being Justices Holmes, Pitney, Brandeis and Clarke, the former two writing opinions and the latter two merely concurring in dissent.

Justice McReynolds, who alone spoke for the majority, agrees with the New York court that Federal Employers' Liability Act does not apply to an employe on an ocean-going ship plying between ports of different states, but he considers that a workmen's compensation act enacted by a state does so impinge on general maritime law as to interfere with the purpose of Congress to establish proper harmony and uniformity of law on that subject.

He said: "By § 9, Judiciary Act of 1789, the district courts of the United States were given 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.' And this grant has been continued. In view of constitutional provisions and the Federal Act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied." He then cites several cases of liens created by state statutes, of pilotage fees and even the right to recover in death cases.

This last instance seems quite apt on the question, whether the common law, recognized by the statute of 1789, could be affected by state legislation.

But cases are cited where state legislation has been restricted to the extent that they cannot authorize proceedings in rem, nor create liens for material used in repairing a foreign ship.

He concludes as follows: "And plainly, we think, no such legislation is valid, if it contravenes the essential purposes

expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

The Justice appeared to think there was a very flexible rule. It is hard under it to recognize recovery for death, when the common law forbade that and to deny application of a Workmen's Compensation Act.

Justice Holmes appears to think about as thus suggested. He says: "Courts cannot give or withhold, at pleasure. If the claim is enforced or recognized, it is because the claim is a right, and if a claim depending on a state statute is enforced, it is because the state had constitutional power to pass the law."

He then speaks of maritime law as follows: "The maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea." And he argues that as admiralty "cannot extend the maritime law, as understood by the Constitution," so "it must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a state. The only authority available is the common law or statutes of a state."

It is a singular situation, if we are to be bound to rules forever constituting our maritime law, because our federal government can create no new maritime law nor can our states. It would be equally strange that, if this maritime law is common law, states, which can change the common law generally, cannot do so when it is maritime law. But if the government can devise what shall work harmoniously, why cannot it establish all of our maritime law?

It seems to us, that in decision we have merely failed to differentiate between state and Federal power as we should, and, essentially, the question is akin to that which is involved when there is a question whether a state regulation imposes a direct or an incidental burden on interstate commerce. Our system of dual rights between the government and the states does not always permit us to reason along strictly logical, so much as along practical, lines. We are bound to make this system co-ordinate if possible.

NOTES OF IMPORTANT DECISIONS.

COMMERCE—ORDINANCE PROHIBITING ADVERTISING OF INTERSTATE ARTICLES.—In 85 Cent. L. J. 21, there was referred to a case by Michigan Supreme Court holding that under the rule laid down in Browning v. Waycross, 233 U. S. 16, there was no interstate feature in a sale by a foreign corporation agreeing to install apparatus as part of price, because this was not absolutely necessary to effect the sale of the apparatus, which of itself constituted an interstate article.

In the Supreme Court of Colorado it was held that an ordinance prohibiting the distribution of circulars, placards and other advertising matter, unless permit were first obtained, for which a fee of $25 was exacted, was plainly a revenue measure and, therefore, was invalid insofar as it operated to prevent the salesman of an article in interstate commerce from distributing samples of the article and recipe books showing its practical use. City of Pueblo v. Lukins, 164 Pac. 1164.

The court said: "From the stipulated facts it appears that the agreement to advertise the article in question by free distribution of books and samples was a part of the contract and part of the consideration therefor. It was one of the causes which put in motion the interstate shipment."

But we do not understand, that, according to the rule laid down in Browning v. Waycross, the test of what may or may not be an interstate shipment depends altogether on any such considerations. In the Browning case and in other installation cases the test was not as the parties chose to contract, but what the nature of the article required should be pro-

vided for so as to effect a sale. It is not upon preference of parties in the way they contract.

Thus, take the Colorado case, in which was a collateral agreement for advertisement that was said to be the moving cause of the sale of the interstate article. This is unconnected with the sale of the article. Purchasers care nothing about this. If it is necessary for the sale, that is an incidental matter. In installation cases there must be necessary connection with the very contract itself, or the installation is local.

We fail to appreciate why the Colorado court deemed it necessary to determine that the ordinance was merely a revenue measure. If it ranked even as a police measure, it could no more interfere with interstate commerce than were it merely a revenue measure. But it did not essentially interfere with a sale in interstate commerce, as we understand the Browning case.

POLICE POWER—PROHIBITING SALE OF SUBSTITUTES FOR LIQUOR. — Alabama Supreme Court, without adverting to police power and its limitations, construes a statute prohibiting the sale of intoxicating liquors "or any device or substitute for any of them." Deeds v. State, 75 So. 645.

The court speaking of the statute says: "This was intended to prevent the keeping for sale and selling beverages that looked like prohibited liquors, so that those persons who were trying to avoid and thwart the various laws for the promotion of temperance could not use the imitations as a fence to hide and cover the sale of the real thing. Therefore, a liquor that foams like beer, looks like beer, tastes like beer and is put up in bottles like beer and has a name that suggests a very popular and well-advertised beer, is a 'substitute or device' within the meaning of the law. Therefore this evidence was competent and properly admitted."

However tacitly the court may have accepted this statute as being within police power, is it thus? Is there any reasonable classification within the exercise of police power for declaring an innocuous article forbidden because it is a "substitute" for beer, or a "device" for beer? What harm is there in a "substitute" or a "device" unless it is intrinsically of potential harm? Might it not be said that beer is a "substitute" or "device" itself for a harmless article? It is readily appreciable that there might be greater sale for an article under the name of beer than if it sold on its own merits.

But there is another reason why such a statute might not be valid and that is that "devices" and "substitutes" are such according to individual views or personal tastes. What would be a substitute for one man or one palate might not be for another. "Substitute" or "device," therefore, creates no standard and under it property not subject to police power is, nevertheless, affected thereby.

FRATERNAL INSURANCE — DESIGNATION OF NEW BENEFICIARY IN FORBIDDEN CLASS.—In Grand Lodge, A. O. U. W. v. Conner, 100 Atl. 1022, decided by Maine Supreme Judicial Court, it is held that where the wife of a member died and he changed the beneficiary to one named as his granddaughter, who was not such by legal adoption, and the order received assessments from him, but did not in fact know the new beneficiary was not his granddaughter, his heirs, as by direction in the by-laws in the case of a named beneficiary predeceasing the member, take the fund.

The court admits that had the Order have known that a beneficiary not of a class had been named, it could have waived the illegal designation, but says the case before it is not of this kind.

All courts are in agreement upon the principle that such a beneficiary has at most only an expectancy. The question, therefore, of the sufficiency, or not, of the new designation was one wholly between the Order and the member. The Order is bound and not the member to see to the enforcement of its rules. If it takes a chance on accepting assessments in a new description or even in an original designation being or not in a proper class, it has the right to take such chance.

This seems especially true in a case where only by-laws and not a statute fixes the classes. It ought not to be allowed that a member acting in good faith, as seemed in the case at bar, should go on paying assessments and his beneficiary become in no way entitled to the benefit on his decease. In this case the assessments on new designations were continued for 24 years, starting with the mother, first-named beneficiary, and changing to her daughter. Neither this mother or daughter had been legally adopted by the member. The mother was a niece and had been brought up in the member's family.

PRESS CENSORSHIP.

The first amendment of the federal Constitution provides that Congress shall make no law abridging the freedom of speech of the press. A similar provision is contained in the state constitutions. At the time this article is written we are in the midst of an attempt in Congress to provide for censorship of the press during the period of the war. Whether this be adopted or not and in what form it is adopted are matters of comparatively little importance. What it is necessary to know is how far Congress can go in passing laws regulatory of the press, under the Constitution. Then by comparing any law, that may now or subsequently be passed, with our conclusions we will at least have a working basis to start on in determining its constitutionality.

The first question to be answered is: "What is freedom of the press?" The primary meaning of 'liberty of the press,' as understood at the time our early constitutions were framed, was freedom from any censorship of the press, and from all such restraints upon publications as had been practiced by monarchical or despotic governments in order to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and as to the duties of their rulers."[1] Again: "The provisions of the Constitution of the United States and of the several states guaranteeing the freedom of the press are intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large. Where a private citizen has the right to speak the truth in reference to the acts of government of public officials or of individuals, the press is guaranteed the same right."[2]

(1) 6 R. C. L. 254.
(2) 6 R. C. L. 255. See also Riley v. Lee, 88 Ky. 603; 11 S. W. 713.

Lord Mansfield, in the famous case of Rex v. St. Asaph,[3] said that liberty of the press "consists in printing, without any previous license, subject to the consequence of the law."

The case of People v. Croswell, arising in New York in 1804,[4] is interesting. Crosswell had published in "The Wasp" certain matters alleged to be "seditious libel," slandering President Jefferson. Hamilton, of counsel for the defendant, declared in his argument: "The liberty of the press consists in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals. * * * But he did not mean to be understood as being the advocate of a press wholly without control * * * but contended for the right of publishing truth, with good motives, although the censure might light upon the government, magistrates, or individuals. * * * The check upon the press ought to be deposited * * * in an occasional and fluctuating body, the jury, who are to be selected by lot. * * * Men are not to be implicitly trusted, in elevated stations. * * * The road to tyranny would be opened by stifling the press, by silencing leaders and patriots. * * * The allowance of this right is essential to the preservation of a free government; the disallowance of it fatal." In his opinion Kent said there should be restrictions but only after publication. To constitute a defence, he said, there should be (1) truth, (2) good motives, and (3) justifiable ends. The last two of these depended on intent. But the question of intent really means nothing at all, as everyone is presumed to know and contemplate the natural consequences of his actions.

The first amendment was primarily intended to prevent all such previous re-

(3) 3. T. R. 428.
(4) 3 Johnson 336.

straints upon publications as had been practiced by despotic governments. Congress can probably pass laws "respecting" the freedom of the press, for the clauses in the first amendment relating to religion and the press use, respectively, the words "respecting" and "abridging." The distinction was noted by Iredell in his charge to the jury in the case of the Northampton Insurgents. We shall see later just how far laws "respecting" the freedom of the press may go if past experience and precedents are to govern our present conduct.

Let us now see just why the amendment was insisted upon and the general attitude towards it at the time of its adoption. The first American Congress in 1774 enumerated five rights without which a people cannot be free and happy,[5] and one of these was the freedom of the press, which must admit the "diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs." The reader will recall that there was considerable opposition to the adoption of the first ten amendments, on the ground that they were unnecessary. Hamilton, in the Federalist, declared: "The power does not exist in the national government to legislate concerning the press."[6] Similarly, C. C. Pinckney in the South Carolina House of Representatives in the debate on the federal Constitution declared:[7] "The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press." But Pinckney and Hamilton seemingly overlooked the possibility that under the doctrine of implied powers which later arose from the express powers given, the power to regulate the press might have been asserted. Jefferson seems to have recognized this when, arguing for the adoption of the first amendment, he said: "But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and might be construed to include regulation and legislation concerning the press. * * * We ask for a declaratory amendment to the Constitution which shall put it beyond peradventure that it is not one of the powers granted to the national government." By both the opponents and advocates of the amendment, therefore, it was thoroughly understood that all power over the press was excluded from the United States government.

The first attempt or law to affect the freedom of the press was the famous Sedition Act of 1798, which did more than any one other thing to overthrow the Federalist party. The offense defined was to write, print, utter or publish, or cause it to be done, or assist in it, any false, scandalous, and malicious writing against the government of the United States, or either house of Congress, or the president, with intent to defame, or bring into contempt or disrepute any or all of them. The truth was to be permitted in evidence, on every prosecution under that act, and this was declaratory of the already existing law. This was of no real value, however, since opinions and influences, and observations and statements based on conjecture and analysis, cannot be made the subjects of that kind

(5) Journals, I, 57.

(6) I previously suggested that perhaps legislation "respecting" the freedom of the press might not be held void. The matter has never been determined by the courts, though there are some dicta on it; all the legislation concerning the press which has been upheld has arisen from express powers in the constitution, such as control over the mails.

(7) Farrand, Records, III, 256.

of proof which appertains to facts, before a court of law.

The Virginia Resolutions of 1798 denounced the Act "because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." Both the Virginia and Kentucky Resolutions of 1798 declared the laws of no effect and void, as contrary to the Constitution, and asked their sister states to present their views on the Act. The responses of the Federalist legislatures were unanimous in denying the right of states to pass on the constitutionality of federal laws, and for the most part upheld the principle and form of the alien and sedition laws.

The constitutionality of the Sedition Act was never decided by the courts of higher resort, and many judges, as Chase in the Callender case, refused to permit considerations of the Act's constitutionality to be raised.

President Roosevelt in 1908 tried to have the government prosecute the New York World and Indianapolis News for an alleged libel of the president and the government, concerning the Panama canal. His action was widely denounced as an attempt to establish lese majeste in this country, and the Supreme Court in deciding the case[8] carefully refrained from passing on the subject of seditious libel.

The Sedition Act and Mr. Roosevelt's action bring clearly to our attention the question as to whether the government can be libelled—whether seditious libel is possible? Henry Wolf Bilke has maintained that the power exists in the United States to punish for seditious libel.[9] Willoughby asserts:[10] "It would seem beyond question that Congress may define and punish seditious libel, provided the publication extends to acts which clearly tend to sedition." The difficulty here would be to determine what publications "clearly tend to sedition." If we say that the phrase means only those which attempt forcibly to subvert the government the statement is considerably weakened. The leading authorities, however, hold that seditious libel cannot exist. Professor Schofield of the Northwestern University Law School even goes so far as to assert: "The crime of sedition and liberty of the press as declared in the First Amendment cannot co-exist."[11] Professor Freund is more moderate, simply saying:[12] "The offense may be said to be practically obsolete." Jefferson and Madison both believed the Sedition Act to be unconstitutional. Calhoun, writing in August, 1832, said that from the date of the formation of the Constitution, in 1787, down to 1832, but one question of a political character had been settled in the public opinion, and that question was the unconstitutionality of the sedition law. In 1836 he declared that the sedition law was clearly unconstitutional.[13]

Later authorities have likewise asserted the unconstitutionality of the sedition act.[14] On the whole, it is difficult to see why seditious libel against the government can be said to exist. Political liberty means nothing if all attempts to provoke disaffection to the existing government are to be prohibited. But this does not mean that the state can be deprived of the primary right of self-preservation. This has been aptly asserted by Freund:[15]

(8) U. S. v. Press Publishing Co., 219 U. S. 1.
(9) 50 Am. L. Reg. (N. S.) 1.
(10) II Constitution, § 450.
(11) Publications Am. Sociological Soc. 87.
(12) Police Power, 509.
(13) Works, V. 191.
(14) Tucker on the Constitution, II, 669; Von Holst, Constitutional History, I, 142. For account of political effects see McMaster's History, II, 397.
(15) Police Power, 509, 510.

"A proposition to forbid and punish the propagation of the doctrine of anarchism, i. e., the doctrine or belief that all established government is wrongful and pernicious and should be destroyed, is inconsistent with the freedom of speech and press, unless carefully confined to cases of solicitation of crime. * * * The freedom of political discussion is merely a phrase if it must stop short of questioning the fundamental ideas of politics, law and government. Otherwise every government is justified in drawing the line of free discussion at those principles or institutions, which it deems essential to its perpetuation, —a view to which the Russian government would subscribe. * * * Freedom of speech (and of press—N. S.) finds, however, its limit in incitement to crime and violence. * * * Therefore a statute may validly forbid all speaking and writing the object of which is to incite directly to the commission of violence and crime."

Many persons have attempted to justify the various censorship provisions proposed by analogy to the common law and statutory doctrines of libel and the alleged existence of the possibility of seditious libel. Assuming that the government cannot be libelled it is difficult, if not impossible, to accept this view. No matter how unwise it might be the publication of military news cannot be said to tend to forcibly subvert the existing government nor incite directly to the commission of crime and violence. Neither the doctrines of sedition, seditious libel, common law or statutory libel[16] can justify such censorship of the press, either by previous restraint or subsequent punishment, as has been proposed.

In 1836 it was proposed in the senate to forbid the delivery of abolition documents through the mail, Jackson having recommended prohibition of the circulation of "incendiary publications" in Southern states. The general opinion, however, was that Congress could not exclude publications from the mail. Much of the successful opposition was based on the doctrine of "States Rights"—it being held that the central government should co-operate with the states in preventing delivery but should not attempt to prevent transporation.

In ex parte Jackson,[17] the following principles were declared: (1) The power to establish postoffices and post roads gives Congress the power to designate what may be excluded from the mail; (2) Congress' object in excluding various matters is not to interfere with the freedom of the press but to protect the public morals; (3) the transportation in any other way of matter excluded from the mails is not forbidden. The decision would seem to prohibit any exclusion except on the ground of "public morals." As regards the latter point of the decision the court reasoned as follows: Regulations against transporting the mail cannot be enforced so as to interfere with the freedom of the press. Liberty of circulation is essential to that freedom; so when printed matter is excluded from the mail, its transportation in any other way as merchandise cannot be forbidden by Congress. This case was affirmed in In re Rapier,[18] where it was held that a law excluding a newspaper carrying lottery advertisements from the mails was justified by the power to establish postoffices and post roads. Congress' power to exclude from the mails, then, would seem to be confined to matters concerning "public morals," and even if this could be successfully overcome, there would still be the decision of the court that transportation in any way other than through the mails cannot be forbidden.

We have no real experience with censorship in this country, even in time of war. During the Civil War, when the very life of our country was imperiled, and fighting was occurring on our own soil, there was no governmental censor-

(16) Since there is no common-law of the United States.

(17) 96 U. S. 727.
(18) 143 U. S. 110.

ship of the press, although there were a number of papers suppressed. A brief survey of the suppression in the Northern states—for the restrictions in the border states need not be considered, being for all practical purposes in regions actually invaded or in danger of invasion—will be of interest.[19] On August 16, 1861, in the United States Circuit Court of New York the grand jury presented the Journal of Commerce, the Daily News, the Freeman's Journal, and the Brooklyn Eagle as aides and abettors of treason. Six days later the Postmaster General forbade their carriage in the mails. Other papers were shortly excluded from the mails, twelve in all being thus barred. On August 22, Marshal Millward seized all copies of the News and totally suppressed its sale in Philadelphia; the Christian Observer was suppressed for referring in violent terms to the "unholy war." Dec. 1, 1862, resolutions of inquiry were offered in the House by Vallandigham and on January 14, 1863, in the Senate by Carlisle. On January 20, 1863, the Committee on Judiciary of the House presented a report, which included a letter from the Postmaster General, who said the freedom of the press could not be used to "aim blows at the existence of the government, the Constitution, and the Union." Again: "While this department neither enjoyed nor claimed the power to suppress such treasonable publications, but left them free to publish what they pleased, it could not be called upon to give them circulation. * * * The mails established by the United States government could not, under any known principle of law or public right, be used for its destruction." He did not claim the government could prohibit the publication of papers or suppress them, but simply said their circulation through the mails could be forbidden, presumably under the proprietary power. It is worthy of note that in 1835, Kendall, the Postmaster General, denied that even in war time there would be any power of supervision over letters passing through the mail.

May 19, 1864, the offices of the Journal of Commerce and the World—which had printed a forged proclamation of the president calling for 400,000 troops—were seized and held for several days by the military authorities, acting under the orders of the Secretary of War. On May 23, Governor Seymour of New York directed District Attorney Hall that if this was done without sanction of state or national laws the offenders must be punished. On June 13, the grand jury refused to investigate the matter and Governor Seymour directed Hall to make a full investigation. As a result warrants were issued on July 1 by City Judge Russell and General Dix and other officers were arrested. I have been unable to learn what disposition was made of the case. On May 23, however, by a vote of 54 to 79 the House rejected a resolution censuring the government's action.

In October, 1864, judgment was recovered in the United States Circuit Court by one Hodgson against Marshal Millward for his seizure of the press of the Jeffersonian, published at West Chester.

Such cases, however, were isolated and "the press was essentially free at the North, entirely so at the South, where no journals were suppressed, as some had been in the Union. * * * The Union generals were offended by the publication of estimates of the strength of armies or shrewd guesses of projected movements. * * * The right of public meeting was fully exercised in both sections, but the gatherings for free discussion were much more common at the North."[20] President

(19) The following facts are for the most part gathered from McPherson, History of the Rebellion, 188-192.

(20) Rhodes, History of the United States, V. 473.

Lincoln and the Union authoriteis, in times much more serious than we are now seeing or likely to see, refrained from passing any general law designed to curb the right of the press to publish what it wished.

Many of the advocates of some form of censorship admit that in normal times the first amendment would prohibit such a measure. They urge, however, that the war power is ample to permit Congress to pass laws designed to regulate the press. Or that the "necessary and proper" clause can be stretched to include censorship. If the latter clause could be so used—then why could it not be used in time of peace, if Congress considered it desirable in order to facilitate the carrying out of some law passed? Said Senator Nelson, one of the best lawyers in the Senate, on April 19: "That is a part of the authority of Congress under the war-making power. * * * The federal government exercises the police power in aid of and under the war power. * * * The discretion must be left to the heads of the war and navy departments and to the president of the United States." Senator Sterling on the same day practically admitted the unconstitutionality of the proposed legislation but defended it on "the principle of sovereignty and of self-preservation" and as a "just and reasonable war measure." And Senator Overman said it could come under the power given Congress to "provide for the common defence." Senator Fall declared: "All rules of law are set aside in the face of national necessity, of self-preservation." This statement would truly have furnished much satisfaction to the German apologists for the invasion of Belgium. Senator Colt practically asserted likewise that the Constitution is suspended in case of war. Senators Walsh and Pomerene justified censorship under the war power. Senators Borah, Reed, Townsend, Cummins and others strongly denied that the war power could be so used as to suppress the first amendment. If the doctrine were true we could extend it to all the other clauses of the Constitution—freedom of speech in Congress, trial by jury,—there would be no ultimate limit, except the consent of the people, which, if such powers could be used, might be obtained by deceit and force.

Is it true that we can now constitutionally disregard the Constitution? Was there a Constitution made for a time of war and another made for peace? Do the first ten amendments apply only in normal times? We find nothing in the Constitution itself or in the debates on the adoption of the Constitution which could lead to such a view. Can a foreign power shatter our Constitution by making war upon us? No other meaning can be attached to statements which directly or indirectly say that the Constitution is suspended in time of war. On the contrary can we not as earnestly maintain that we should not proceed in an illegal manner, as it is only in time of war or great stress that the constitutional limitations upon despotism are put to the test? The moment for enlargement of power and privilege is in a time of public agitation and alarm; the provisions in the Constitution mean little at all if they are not capable of use at such times.

But we do not have to rely on belief and logic to support the view that the Constitutional provisions are still operative. The case of ex parte Milligan seems to be decisive. The question at issue was whether the guarantee of trial by jury was intended for a state of war as well as a state of peace. Milligan's counsel consisted of David Dudley Field, James A. Garfield and Judge Black—three of the greatest lawyers of the period. Opposing them were Attorney General Speed and B. F. Butler.

The opinion of the court, delivered by Mr. Justice Davis, declared: "The Constitution of the United States is a law

for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism." This view would certainly apply in the case of a specific statement, such as contained in the first amendment. The court continued: "If society is disturbed by civil commotion * * * these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws." In the Confederacy the courts held that Davis could not suspend the writ of habeas corpus.

Washington did not presume to override the civil law, or disregard the orders of the courts, in the Whiskey Rebellion of 1793. General Jackson was punished by the courts for his unconstitutional acts at New Orleans. Said Lord Chief Justice Willes in 1745:[21] "Whosoever set themselves up in opposition to the law, will in the end find themselves mistaken."

How has the censorship worked in the countries at war? We are best informed of the condition in England. The veil of censorship was tightly clamped at the beginning of the war. Because the people were unaware of the real facts the ultimate success of England was imperiled, and it was only the courageous action of Lord Northcliffe, acting in violation of the law, which turned out the inefficient men in control. The public must be informed boldly and even in the face of opposition; there must be no "sword of Damocles" hanging over the head of those who desire to criticise the government.

(21) McArthur, Courts-Martial, I, 268-271.

"The object of the establishment of the censorship was to obfuscate the Germans, not to obfuscate Englishmen, and yet we find it again and again deliberately concealing from English readers facts which are known to every German schoolboy. * * * Any office staffed with men armed with blue pencils is bound to work unsatisfactorily."[22] Indiscriminate censorship will never be satisfactory and should be guarded against with all vigilance. In Germany there has been relative freedom in military news, with severe restrictions on the criticism of policy; the reverse has been true in France, though there, too, there have been many restrictions on criticism. To influence public opinion the military authorities will even falsify and manufacture news, as has been done in England,[23] and quite probably in all the other countries.

In a democratic state the people must be kept intelligently interested, or the success of the war will be in doubt. The press is more than a news agency; it is a molder of public opinion. One of the best summaries of the argument against "strictness" is found in the Quarterly Review for January, 1916 (pp. 149, 150):

"Military and naval information or criticism which may handicap our fighting strength must be suppressed. Political information or criticism which may cripple our diplomacy or make trouble with neutrals, or give any military assistance to our opponents, must be forbidden. But no public man and no ministry is entitled to shelter behind the censorship and thereby escape that popular supervision which is essential to our system of government. * * * 'Considerations of public policy' is a resounding phrase, but it is capable of great abuse. It seems so reasonable at first sight to argue that attacks upon a government which is conducting the war must tend to the weakening of that government and so to the handicapping of the national effort. * * * It is a claim which cannot for a moment

(22) 287 Living Age 757.
(23) 99 Nation 513.

be allowed, and for a very simple reason. In a democracy such as Britain, ministers draw their power from the people; and the condition of their tenure is that the people can criticise and if necessary dismiss them. * * * Now such a system is ridiculous unless popular opinion has a chance of making itself felt."

Of course, the provision providing for punishment of treason would provide punishment for the publication of news designed to aid the enemy.[24] We might mention here that mere expression of opinion indicative of sympathy with the public enemy will not ordinarily involve the legal crime of treason.

But our question is, rather, whether we can prevent in advance the publication of news. Disregarding the question of legality for the moment let us ask ourselves how far censorship, if permitted, should go—and also to what extent we can have censorship which will not abridge the freedom of the press?

In the first place, only the publication of news concerning military and naval movements should be prevented. The publication of news concerning food, ammunition, and supplies should not be forbidden. Secondly, the result of any engagements should be permitted to come to the knowledge of the public. When an action is over there is no logical reason for secrecy. The enemy know of it; why should not we? The names of ships or units involved can properly be made known. The ships of all nations are known by sight to the naval officers of the other countries, if not by name, at least by type; as to soldiers involved in a battle, if the enemy capture them the regiments are made known either directly by the soldiers or by the metal identification disks carried, and in any case the enemy has a chance to examine the dead and see what regiments were engaged. If soldiers know that their work will be known and appreciated at home it is an incentive under the most discouraging circumstances. Lastly, military authorities should not be permitted to control indefinitely the length of time that news shall be suppressed. A limit of thirty days, or even less, would prevent the leakage of military secrets, and give us the information on which to base intelligent criticism. That this is not impracticable is shown by Stoddard Dewey in the Nation of February 10, 1916, who says that his letters sent from France to the United States were not censored as "the time they take on the way is thought to guard sufficiently against indiscretion, which would be obsolete before arrival."

In the foregoing study it has been seen that the Constitution applies equally in time of war and in time of peace, and that therefore laws "abridging" the freedom of the press would be unconstitutional. The question, therefore, is whether laws "respecting" the freedom of the press would be upheld. The question is doubtful, but the courts would quite probably uphold such legislation at the present time; that the Supreme Court does not take cognizance of public necessity and prevailing conditions is shown in its decision on the Adamson law. But laws "respecting" the press to be declared constitutional would have to come under some express or implied power given Congress. Thus restrictions on carriage through the mail and requirements of statements of ownership and circulation have been upheld under the postal power. The immediate necessity of any prohibition of the appearance of news would have to be conclusively shown, and the courts would probably hold that any prohibition extending beyond a period absolutely necessary would be illegal. The purpose of the first amendment was to secure freedom from previous restraint; whether any law involving the slightest element of previous restraint would be upheld is doubtful. Certainly the case

(24) 1 Bond (U. S.) 609.

for such a law would have to be skillfully presented; we have here indicated some of the points which would be involved.

NOEL SARGENT.

Chicago, Ill.

INSURANCE—CONTRACT.

HOME INS. CO. v. UNION TRUST CO.

Supreme Court of Rhode Island. June 13, 1917.

100 Atl. 1010.

A fire insurance policy's mortgage clause making the policy payable to mortgagee, as its interest may appear, provided that, if the mortgagor fails to pay the premiums, the mortgagee shall pay them, is not an absolute agreement on the mortgagee's part to pay the premiums, but merely makes such payment a condition to its recovery on the policy.

STEARNS, J. This is an action to recover certain premiums upon two policies of fire insurance issued by the plaintiff on hotel and other property of the Mathewson Company in Narragansett, R. I.

When the plaintiff issued these policies, by reason of the attachment of the riders thereto, it entered into two separate and independent contracts of indemnity, relating to the same subject, but applying to different interests therein: (1) A contract with the owner subject to certain conditions appropriate to the relation of owner to insurer; (2) a contract between the insurer and the mortgagee only, becoming effectual when the owner failed to pay premiums or violated the conditions of the policy, and concerning which the relation of the original insured to the property, or his acts or neglect, are of no account. When the first contract failed, or if it never attached, this second contract began and proceeded subject to its own conditions and limitations. See Smith v. Union Insurance Co., 25 R. I. 260, 55 Atl. 715, 105 Am. St. Rep. 882.

The insurance company is entitled to the payment of the premium on the delivery of the policy, and consequently has the power to protect itself fully, without recourse to the mortgagee. It is in a position at all times, with full knowledge of the facts in regard to the payment of premiums, to call for payment from the mortgagor, and, if dissatisfied, can cancel the policy by giving the prescribed notice. On the other hand, the mortgagee in many cases has no means of knowing whether the premium has been paid, and, as the insurance company must first make demand on the mortgagee for payment before rights of the mortgagor can be affected by the failure of the mortgagor to pay, it would impose an unreasonable burden on the mortgagee to require it to keep constant watch on the condition of the account between the insurance company and the mortgagor in order to protect itself from liability for unpaid premiums.

In this particular case it seems to be clear that the mortgagee did not intend or understand that it was bound unconditionally on demand to pay to the plaintiff the premiums on failure on part of the mortgagor to pay. By the second clause of the trust deed quoted above it is specifically provided that it shall be no part of the duty of the trustee to insure the property or to keep informed as to the payment of assessments, etc., against the same. From the conduct of the insurance company it also seems clear that the company did not consider that the mortgagee was liable. The only payments on the policy issued August 1, 1914, were made between July 7, 1915, and August 28, 1915. No request for payment during the life of this policy was made on the mortgagee. So far as appears, the first intimation that the trustee had that the mortgagor was in arrears was in October or November, 1915, when the plaintiff asked the trustee to pay the premium on the policy which had been issued August 1, 1915, and threat was made to cancel said policy unless the premium was paid. Not until on or about December 24, 1915, and after it had canceled the policy, did the insurance company make demand upon the mortgagee for payment.

The following cases support the contention of the plaintiff that the clause in question imports an agreement: Boston Safe Deposit & Trust Co. v. Thomas, 59 Kan. 470, 53 Pac. 472; St. Paul Fire Ins. Co. v. Upton, 2 N. D. 229, 50 N. W. 702. Opposed to these cases are the cases of Ormsby v. Phœnix Ins. Co., 5 S. D. 72, 58 N. W. 301, and Coykendall v. Blackmer, 161 App. Div. 11, 146 N. Y. Supp. 631, which hold that the clause in question is a condition, and not a covenant. The case of Coykendall v. Blackmer is a recent case, decided in 1914, in which the court carefully considered the cases St. Paul Fire & Marine Ins. Co. v. Upton and Boston Safe Deposit & Trust Co. v. Thomas, *supra*, and declined to

follow them. We agree with the decision in the Coykendall Case, *supra*, that the provision in question should be construed as a condition rather than a covenant.

Decision for defendant for costs.

NOTE.—*Obligation of Mortgagee to Pay Premium in Insurance of Property.*—Assuming the mortgagee clause in the policy in the instant case to be that in standard policies, authorities appear quite variant whether there is credit by insurer to mortgagor alone, or whether there is also an agreement by mortgagee to pay if mortgagor defaults.

It is certain that, if a mortgage is given, the interest of mortgagor to keep policy alive is reduced and this interest may be reduced to the vanishing point. Therefore when there is a mortgage clause and this contains an agreement by the insurer to keep the policy alive after cancellation except for a limited time "for the benefit only of the mortgagee," this is a provision solely for the latter's benefit. Unless, therefore, there is some consideration moving the insurer to give this extension, it would seem to be *nudum pactum*.

In Coykendall v. Blackmer, 146 N. Y. Supp. 631, 161 App. Div. 11, the court speaks of there being a new agreement between insurer and mortgagee. It was said the clause is "attached to the policy for the purpose of enabling the mortgagor to perform the covenant of insurance contained in the mortgage and in consideration of the taking of the policy by the mortgagee." This does not seem to us an altogether accurate statement. The insurer has nothing to do with the mortgagor's covenant to carry insurance nor with the consideration that moves the mortgagee.

The opinion goes on to say: "While the mortgagee clause was for the benefit of the mortgagee in the respect before referred to, it was for the benefit of the insurance company in that it required the mortgagee to notify the company of any change of ownership, or occupancy, or increase of hazard which should come to his knowledge and to pay the premium for the increased hazard, otherwise the policy should be null and void." Let this be granted and yet this more strongly shows mutual promises.

In Ormsby v. Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301, the question was whether there was a forfeiture of the policy and not whether the mortgagee agreed to become liable for the premium in case it was not paid by mortgagor.

The identical question in the instant case came up in Boston Safe Deposit & Trust Co. v. Thomas, 59 Kan. 470, 53 Pac. 472, and it was there held that there was a promise to pay upon mortgagor's failure to pay within the time stated after notice. The Kansas court said: "This question is not difficult. While the word 'provided' ordinarily indicates that a condition follows, there is no magic in the term, but the clause is to be construed from the words employed and from the purpose of the parties gathered from the whole instrument." The court goes on then to speak of the covenants by the mortgagor to the mortgagee. But it is said: "The provisions quoted in the deed of trust and the insurance policies were to the end of keeping the insurance paid and rendered the beneficiaries liable for the unpaid premiums."

In St. Paul F. & M. Ins. Co. v. Upton, 2 N. D. 229, 50 N. W. 702, Corliss, J., said: "Does the clause contain an express promise on the part of the mortgagee to pay the premium in case of the default of the mortgagor? It is insisted that 'it merely prescribes a condition on the performance of which the mortgagee may entitle himself to benefits of this clause.' But why should this agreement be so construed as to give the mortgagee the option to avail himself of its provisions while the insurance company is to have no choice? If this was the intention of the parties why did not the provision read as follows: Provided that the mortgagee, in case of default of the mortgagor shall have paid the premium at the time he claims the benefit of this clause. This would have left him an option. But the clause, as it does read, is an absolute engagement to pay the money on the default of the mortgagor—'then on demand the mortgagee shall pay the same.' The clause provides that no neglect or act of the mortgagor, nor shall the vacancy of the premises, invalidate the policy. * * * The mortgage clause gave the mortgagee immunity from certain forfeitures resulting under the policy from the mortgagor's acts or omissions, and the mortgagee in terms agreed to pay for this immunity the premium in case of the mortgagor's default. This is the clear import of the agreement."

These cases seem about all of authority directly applicable to this question. But it does seem that, whether the mortgage clause is executed contemporaneously with the execution of the mortgage or is afterwards executed, it is solicited at mortgagee's request, is for his benefit, is collateral to the issuance of the insurance and the insurer obligates himself further to protect the mortgagee. Does he do this upon no consideration whatever? The New York case says the mortgagee makes a promise for the benefit of the insurer. That may be, but the arrangement was complete without mortgagee's intervention.

C.

HUMOR OF THE LAW.

"Hobson is facing a serious charge."

"Why, what crime has he committed?"

"No crime. He's gazing at his spring coal bill which has just come in."

Judge: "How came a man of your ability to stand here convicted of forgery?"

Prisoner: "It is all owing to my taking good advice, your Honor. When I left school my teacher told me with my talents to go and forge ahead."—Baltimore American.

Once a very shrewd and diplomatic culprit was brought before a judge in Cleveland.

"You are charged," said the judge, with having registered illegally."

"Well, your Honor," responded the man, "maybe I did, but they were trying so hard to beat your Honor that I just got desperate."

WEEKLY DIGEST

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1. **Adverse Possession**—Estoppel.—Plaintiff is not prevented from establishing title by adverse possession under 10-year statute to a 160-acre tract because defendant's predecessor in title operated a tramroad over a portion of such tract some 12 or 15 years before suit was filed.—Houston Oil Co. of Texas v. Loftin, Tex., 194 S. W. 996.

2.——Minor Child.—Child in possession of land formerly constituting part of tract on which his father resides, under a valid deed thereof from his father, holds in his own right under the deed, and as between them no question of title by adverse possession arises.—Williamson v. Wayland Oil & Gas Co., W. Va., 92 S. E. 424.

3. **Animals**—Damages.—Plaintiff bitten on the hand by dog and subjected to physical suffering in administration of Pasteur treatment and to mental suffering from knowledge that he had been bitten by mad dog, in view of his pecuniary loss not exceeding $100, will be allowed $1,000 damages.—Serio v. American Brewing Co., La., 74 So. 998.

4. **Bailment**—Lien.—Where the reputed owner of an automobile left it with a seller of tires to have a new tire attached and went about his business for a short time, the repairer's possession was of sufficient duration to entitle him to a lien under L. O. L. § 7497.—Courts v. Clark, Ore., 164 Pac. 714.

5. **Banks and Banking**—Agency. — Where vice-president and director of a bank at times acted as cashier, those dealing with bank may assume that he is acting with authority, and bank is bound by his acts "when so acting."—Keith v. First Nat. Bank, N. D., 162 N. W. 691.

6.——Bona Fide Purchaser.—Where officer of corporation makes its commercial paper payable to his own order, signs it as such officer, and transfers it in payment of an individual debt, the transferee is not bona fide purchaser, without notice.—National City Bank v. Shelton Electric Co., Wash., 164 Pac. 933.

7.——National Banks.—State cannot impose any liability upon national bank by adding any powers to those expressly granted or fairly implied in act authorizing its creation.—Myers v. Exchange Nat. Bank, Wash., 164 Pac. 951.

8. **Bills and Notes**—Alteration.—Where note is indorsed in blank, and without indorser's consent, additional words are written above his indorsement, operating to increase his liability, such alteration is material, and discharges indorser from liability.—Sawyer State Bank v. Sutherland, N. D., 162 N. W. 696.

9.——Post-Dated Check.—A post-dated check is legal and proper and payable immediately at its date.—American Agricultural Chemical Co. v. Scrimger, Md., 100 Atl. 774.

10.——Fraudulent Representations. — That bank agreed to take before they were executed, the notes of persons on a list of men desirable for insurance given by bank to insurance agent was no evidence of fraud and did not put bank upon notice of fraudulent representations made by insurance agent to makers of the notes.—Amthon v. First State Bank of Uvalde, Tex., 194 S. W. 1019.

11. **Carriers of Goods**—Damages.—Difference between invoice price of interstate shipment at place of shipment and value when delivered in its damaged condition held the proper measure of damages for loss by carrier's failure to re-ice.—Gulf, C. & S. F. Ry. Co. v. Texas Packing Co., U. S. S. C., 37 S. Ct. 487.

12——Owner's Risk.—By acceptance of bill of lading covering car of apples, which bill included words, "owner's risk," or letters understood by parties to be equivalent, consignor relieved carrier from liability as insurer and limited it to liability for negligence.—McGovern v. Ann Arbor R. Co., Wis., 162 N. W. 668.

13. **Carriers of Passengers**—Jars and Jolts.—Carrier must stop its train for such time as to give a passenger a reasonable opportunity to alight, and to prematurely start train with a sudden jolt while a passenger is alighting, as known or as should be known to trainmen, is negligence.—Montalini v. Pennsylvania Co., Pa., 100 Atl. 806.

14.——Negligence.—Where one traveling on a freight train had to walk between tracks in switchyard to change trains, the yardmaster's direction to him to go alone through the switchyard at night, in view of Gen. St. 1915, § 8536,

regulating conduct of stock trains, was not negligence.—Griffith v. Atchison, T. & S. F. Ry. Co., Kan., 164 Pac. 1094.

15.——Negligence.—Sanitary Code (Vernon's Sayles' Ann. Civ. St. 1914, art. 4553a) rule 52, requiring each depot, etc., while in use for accommodation of public to be heated, if necessary, etc., applies to case of passengers waiting for a delayed train, and failure to perform that duty would be negligence as a matter of law.—Chicago, R. I. & G. Ry. Co. v. Faulkner, Tex., 194 S. W. 651.

16. **Chattel Mortgages**—Description of Property.—In view of Civ. Code 1910, § 3257, purported mortgage lien on "seven head of mules and horses" is uncertain with respect to the description and hence void against one claiming proceeds of sale under subsequent attachment lien.—Reynolds v. Tifton Guano Co., Ga., 92 S. E. 389.

17. **Commerce**—Employes.—A section hand engaged in repair of track of interstate carrier held employed in interstate commerce, within federal Employers' Liability Act, as amended by Act. Cong., April 5, 1910, c. 143.—Louisville & N. R. Co. v. Williams' Adm'r, Ky., 194 S. W. 920.

18.——Employes.—Brakeman, killed by being thrown from top of car being switched to repair track, but en route to another state, held engaged in interstate commerce and the right of action was controlled by federal Employers' Liability Act of April 22, 1908.—Geer v. St. Louis, S. F. & T. Ry. Co., Tex., 194 S. W. 939.

19.——Employers' Liability Act.—In action under federal Employers' Liability Act for injury sustained while clearing litches along defendant railroad's tracks, plaintiff's testimony that there was no other way of draining surface water from tracks is competent to establish that his work was necessary to safe interstate transportation.—Louisville & N. R. Co. v. Blankenship, Ala., 74 So. 960.

20.——Intoxicating Liquors.—Seizure under temperance acts of liquors consigned to defendant in Georgia and removed by him to Alabama and stored temporarily until he could remove them to Florida under contract was not seizure of property in interstate transit.—Theatrical Club v. State, Ala., 74 So. 969.

21. **Constitutional Law**—Due Faith and Credit.—Rendition of judgment on a foreign judgment, over objection that judgment sued on was void for invalid service of process, held not to take property of defendants without due process of law, where judgment was rendered on ground that question of jurisdiction adjudicated in the original case could not be reopened.—Chicago Life Ins. Co. v. Cherry, U. S. S. C., 37 S. Ct. 492.

22. **Corporations**—Implied Power.—The general state agent of a surety company expressly authorized to execute bonds has implied power to employ one to complete the work to prevent loss, when a contractor, for whom the company has given bond, abandons the contract.—Title Guaranty & Surety Co. v. Hay, Ky., 194 S. W. 922.

23.——Notice.—The officers of corporation are bound to know that dog on its premises with approval of agent in charge is dangerous animal.—Serio v. American Brewing Co., La., 74 So. 998.

24.——Parties to Action.—Only such of the sellers of the stock of a corporation as sign a contract of warranty as to extent of its liabilities, inducing consummation of purchase, are necessary parties defendant to action thereon.—Pacific Power & Light Co. v. White, Wash., 164 Pac. 602.

25.——Preferred Stock.—"Preferred stock" is stock entitled to a preference over other kinds of stock in the payment of dividends, which are to come out of net earnings and not out of capital; the stockholder being still a stockholder making a contribution to capital, and not a creditor, or a lender.—Booth v. Union Fibre Co., Minn., 162 N. W. 677.

26. **Damages**—Elements of.—In action for wrongfully altering minute record of circuit court, damages sustained by plaintiff administrator in defending for judge of court mandamus suit, in which contention judge was not sustained, and in expenses of trip to attend prosecution of petition for mandamus on appeal were too remote.—Wilder v. Bush, Ala., 75 So. 143.

27.——Perishable Goods.—Consignee of perishable goods arriving in bad condition discharged its whole duty to the carrier, where it sold the damaged goods for the best price obtainable.—Gulf, C. & S. F. Ry. Co. v. Texas Packing Co., U. S. S. C., 37 S. Ct. 487.

28.——Set-Off.—In a suit to foreclose purchase money mortgage under agreement whereby seller was to improve certain streets in vicinity of property, mortgagor could not set off rental value of a residence which he did not build because of failure of the mortgagee to make contemplated improvements.—Boston Trust Co. v. Evelon Co., Wash., 164 Pac. 606.

29. **Deeds**—Attestation.—A deed omitting to name the grantors before the designation, "Parties of the first part," but concluding, "In witness whereof the said parties of the first part have hereunto set their hands," followed by the signatures of the grantors, is valid.—Yates v. Dixie Fire Ins. Co., N. C., 92 S. E. 356.

30. **Divorce**—Habitual Drunkenness. — Evidence that defendant husband frequently was drunk from three days to two and three weeks, or until he became sick, held to sustain finding of habitual drunkenness justifying divorce.—Wallace v. Wallace, Mo., 194 S. W. 523.

31. **Eminent Domain**—Damages.—The measure of landowner's damages in drainage condemnation proceedings is the difference in market value of property with improvement and without it, without considering general benefits or injuries shared by public.—Schlict v. Clark, Miss., 75 So. 130.

32. **Estoppel**—Silence.—Though the owner of a building was present, and saw the work progressing, and made no objection, he is not estopped when sued for compensation by those employed to superintend the work, to object that they did not properly perform their duties.—Cammack & Son v. Weimer, Ia., 162 N. W. 586.

33. **Exchange of Property**—False Representations.—A representation that defendants in op-

erating an apartment house had received on an average of $150 net during time they occupied premises, was not a guarantee that net income which plaintiffs would receive in operating it would be $150 a month, or any other sum.—Blakney v. Rowell, Ore., 164 Pac. 709.

34. **Fraudulent Conveyances** — Evidence. — Conveyance of land by son and his wife to father to prevent son, an habitual drunkard, from squandering it and preserve land for benefit of son, his wife and their children, was not made to hinder, delay or defraud creditors. Ratigan v. Ratigan, Ia., 162 N. W. 580.

35. **Guaranty**—Construction of Writing.—A promise to guarantee an account up to a certain amount upon understanding that settlement be made semi-monthly, held a guaranty of payment up to specified amount, regardless of previous semi-monthly payments.—Thiensville Creamery Co. v. Hickcox, Wis., 162 N. W. 660.

36. **Homestead**—Negligence.—That the wife who signed deed to the homestead did not read it and that it was not read to her is of no avail where she was advised as to its effect and refused to go on with the deal, but the deed was not destroyed and it was afterwards used, bearing her signature.—Cochran v. Main, Ia., 162 N. W. 561.

37. **Homicide**—Mistake of Judgment. — For mere mistake of judgment in application of remedies, resulting in death of patient, physician is not criminally liable, and whether one who assumes to practice medicine is grossly ignorant of the art, or whether a remedy was inapplicable or rashly applied are all questions to be determined by the evidence.—Feige v. State, Ark., 194 S. W. 865.

38. **Husband and Wife**—Gift.—Where husband surrendered deposit certificates to bank, and took new certificates in names of himself and wife, payable to either, and possession of certificates after delivery was jointly in husband and wife, husband made gift to wife of undivided interest in fund, and created a tenancy by entireties therein.—Dupont v. Jonet, Wis., 162 N. W. 664.

39. **Indemnity**—Notice.—Bank directors were bound to know that certificates regarding cashier's conduct made by them to secure renewal of indemnity bond were true.—Eland State Bank v. Massachusetts Bonding & Ins. Co., Wis., 162 N. W. 662.

40. **Injunction**—Evidence.—Where surface of coal land was conveyed to school district by deed expressly waiving right of surface support, the subsequent removal of the coal to the injury of a school building will not be enjoined. —Commonwealth v. Clearview Coal Co., Pa., 100 Atl. 820.

41.——Waste.—An entry upon land by permission of life tenant confers no greater right than such tenant has, and affords no basis for application to court of equity for injunctive process to protect entrant in performance of acts thereon, which, if done by life tenant, would be regarded as waste.—Williamson v. Wayland Oil & Gas Co., W. Va., 92 S. E. 424.

42. **Insurance**—Additional Insurance.—Provision in fire insurance application and policy prohibiting insured from taking out additional insurance in another company on property described, or its contents, prohibits additional insurance on property covered by policy, but is inapplicable where only a barn was covered by policy and its contents were later insured in another company.—Hurst Home Ins. Co. v. Deatley, Ky., 194 S. W. 910.

43.——Benefit Certificate.—Under benefit certificate excepting risk where death is caused by criminal act, beneficiaries under certificate of one who had assaulted an officer and who was killed by accidental discharge of the officer's revolver in the scuffle could not recover.—United States Bank & Trust Co. v. Switchmen's Union of North America, Pa., 100 Atl. 808.

44.——Breach of Warranty.—Under provision of fire policy against incumbrances made without insurer's indorsed consent, incumbrances when policy issues or during life of policy without such indorsement unless waived, constitutes breach of warranty against such incumbrances. —Riley v. Aetna Ins. Co., W. Va., 92 S. E. 417.

45.——By-Laws.—That a member of a beneficial association knows that the by-laws have been amended, or that he voted for the amendments, does not conclusively show his consent that they may have retroactive force to modify his contract.—Sheetz v. Protected Home Circle, Pa., 100 Atl. 749.

46.——Custom.—Where local lodge or its secretary makes payments for the insured at his request as a loan, that insured does not return loan as agreed will not establish association's custom to extend time of payment.—Chandler v. Royal Highlanders, Neb., 162 N. W. 642.

47.——Evidence.—Where the issue was whether insured was in good health so far as he knew or believed when he made his application, evidence that to ordinary observation and to all outward appearance he was in good health was admissible.—Baer v. State Life Ins. Co., Pa., 100 Atl. 745.

48.——Explosion.—While an insurer is not liable for loss from explosion not produced by preceding fire, yet if explosion is caused by fire during its progress, the fire is the proximate cause of the loss; the explosion being a mere incident, and the insurer is liable.—Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n, Fla., 75 So. 196.

49.——False Representation.—A negative answer to question whether any other company had declined insurance on plaintiff's property is correct, although an application had previously been refused by a concern because it did not write that kind of insurance.—Liverpool & London & Globe Ins. Co., Limited, of Liverpool, England, v. Payton, Ark., 194 S. W. 503.

50.——Forfeiture.—Under a policy providing that failure to pay premium will avoid the policy, a failure to pay a premium constitutes a forfeiture without the necessity of formal declaration thereof by the insurer.—Underwood v. Security Life & Annuity Co. of America, Tex., 194 S. W. 585.

51.——Mortgagee Clause. — Standard mortgagee clause creates independent contract of insurance for mortgagees' separate benefit in-

grafted upon main contract of insurance, and to be rendered certain and understood by reference to policy.—Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n, Fla., 75 So. 196.

52.——Stipulation.—Provision as to prompt payment of premiums is valid, and ordinarily must be strictly observed, unless compliance is waived.—Moore v. General Accident, Fire & Life Assur. Corp., N. C., 92 S. E. 362.

53. **Intoxicating Liquors**—Licenses.—St. 1915, § 1565d, proportioning the number of liquor licenses according to last national census must be complied with and that a city was incorporated after last federal census, or that its population is shown by state census taken under § 925—9, or that it must have had a certain population to incorporate under § 925—7, does not take the place of required census.—State v. McIntosh, Wis., 162 N. W. 670.

54.——Variance.—Where liquor search warrant varied from affidavit in describing property as "3 door W." instead of "2d door W.," both describing property as "the property of Mrs. Cochran," variance was not fatal.—Gullatt v. State, Ala., 74 So. 970.

55. **Landlord and Tenant**—Estoppel.—Where the mortgagee fraudulently purchased the equity of redemption and rented the property to the mortgagor, the latter is not prevented by his tenancy from attacking his landlord's title.—Shaw v. Lacy, Ala., 74 So. 933.

56.——Lease.—An agreement to make a valid lease is an agreement to make such a lease by marketable title, which means a title as to which there is no reasonable doubt in law or in fact.—Blanchard v. Trustees, etc., of German Evangelical Protestant Church in Pittsburgh, Pa., 100 Atl. 804.

57. **License**—Business Subject to.—For one engaged in carrying passengers between points outside a city, to drive through it without stopping, does not constitute "a business transacted and carried on in such city," which, under Charter of Cities of the Sixth Class, § 862, subd. 10 (Deering's Gen. Laws 1915, p. 1123), it may license.—Ex parte Smith, Cal., 164 Pac. 618.

58. **Mandamus**—Discretion. — In mandamus proceedings to compel a school board to restore a teacher to her former position as principal, where the transfer of the teacher was within the board's discretion, the court cannot consider whether her services as principal were satisfactory.—Alexander v. School Dist. No. 1 in Multnomah County, Ore., 164 Pac. 711.

59.——Ministerial Duty.—Mandamus will not lie to review the refusal of the commissioner of banking and insurance to certify that a proposed trust company would be of public service, since the court does not undertake to decide what decision should be reached.—Riddle v. Commissioner of Banking and Insurance, N. J., 100 Atl. 692.

60. **Master and Servant**—Course of Employment.—An employe's death from rupture of blood vessel due to muscular strain and exertion was an accident arising out of and in the course of his employment within Workmen's Compensation Act.—State v. District Court of Brown County, Minn., 162 N. W. 678.

61.——Course of Employment.—Where an employe of a manufacturing concern was eating his lunch in the factory, in accordance with custom, and a pile of crude rubber fell upon him, held that he was performing service growing out of and incidental to the employment, within Workmen's Compensation Act (St. 1915, § 2394—3).—Racine Rubber Co. v. Industrial Commission, Wis., 162 N. W. 664.

62.——Employers' Liability Act.—A truckman in storehouse of a mill could not recover under Employers' Liability Act, § 1, making act applicable to "work in any shop, mill * * * in connection with or in proximity to any" machinery.—Lizotte v. Nashua Mfg. Co., N. H., 100 Atl. 757.

63.——Minors.—The clause, "minors who are legally permitted to work under the laws of the state," found in Workmen's Compensation Act, was intended to exclude minors whose employment is prohibited by law.—Westerlund v. Kettle River Co., Minn., 162 N. W. 680.

64.——Negligence.—Where step on engine tender was old, shaky and loose and lower at one end than the other, held that to leave it in this condition was negligence.—Adams v. S. H. Bolinger & Co., La., 75 So. 218.

65.——Respondeat Superior.—Where defendant's adult daughter took his automobile without his express consent and collided with plaintiff, defendant is not liable under the doctrine of respondeat superior, since the mere relationship did not make the daughter her father's servant.—Woods v. Clements, Miss., 75 So. 119.

66.——Warning.—In section hand's action for injuries sustained from a fall in hurriedly attempting to remove handcar to avoid approaching train, to warrant recovery for negligence of foreman or train crew in not giving warning of approach of train, it must appear that fall was due immediately to haste to remove car, and that an injury of character alleged ought reasonably to have been foreseen as a result of alleged negligence.—Chicago, R. I. & G. Ry. Co. v. Mitchum, Tex., 194 S. W. 622.

67.——Workmen's Compensation Law.—Workmen's Compensation Law, as it existed in 1913, did not entitle servant to compensation for injury not diminishing earning capacity.—Johnstad v. Lake Superior Terminal & Transfer Ry. Co., Wis., 162 N. W. 659.

68. **Mines and Minerals**—Burden of Proof.—Where lessor in oil and gas lease sues assignee of the lease for damages from failure to drill wells on lessor's lands to prevent drainage of oil through wells on adjacent lands, lessor must prove the assignment to defendant, and that his operations were under lease.—Steele v. American Oil Development Co., W. Va., 92 S. E. 410.

69.——Joint Ownership.—Where several landowners unite, executing an oil and gas lease of their several parcels, which described the lands as a single tract, each owner is entitled to his proportionate share of oil reserved to owners, regardless of ownership of tracts on which it is found.—Lynch v. Davis, W. Va., 92 S. E. 427.

70. **Mortgage**—Foreclosure. — In mortgage foreclosure, mortgage reciting that bank had caused instrument to be executed in its own name by H, its president, signed, "People's Savings Bank, H, President," and properly acknowledged as mortgage of bank, held debt of bank, and not that of H individually.—Bank of Tallassee v. Jordan, Ala., 74 So. 936.

71. **Municipal Corporations**—Anticipating Injury.—In action for injuries when horse was frightened by steam exhaust, instruction on anticipation of accident that method of construction and operation of cotton gin might probably cause horses of ordinary gentleness to be frightened did not import mere possibility, and was correct.—Scott v. Shine, Tex., 194 S. W. 964.

72.——Governmental Power.—Although a village has power to lay out a general sewer system, it is not liable for failure to do so to an individual property owner who claimed his ponds had become contaminated.—Crystal Spring Brook Trout Hatchery Co. v. Village of Lomira, Wis., 162 N. W. 658.

73.——Mandamus.—Though Code Supp. 1907, § 1056a15, renders mandamus available to an honorably discharged soldier, when denied the preference required by the law, the remedy of such a person for a wrongful discharge is, in view of § 1056a16, by certiorari.—Butin v. Civil Service Commission of City of Des Moines, Ia., 162 N. W. 565.

74.——Negligence. — Where an automobile drove along a city street at eight to ten miles an hour, and, without sounding a warning to plaintiff, a man of 70, delivering pies from a wagon, struck him, the facts justified the inference of the automobile driver's negligence.—Heckman v. Cohen, N. J., 100 Atl. 695.

75. **Negligence** — Attraction to Children.—Where a tie company piled ties insecurely, and the railroad placed a pile of sand in such proximity thereto that a child attracted by the sand and ties was injured when the stack fell, the

railroad was held liable for allowing such conditions to continue.—Foster v. Lusk, Ark., 194 S. W. 855.

76.——Gratuitous Service. — An automobile driver is not relieved from liability as to a guest for negligence or imprudence merely because he is performing a gratuitous service.—Jacobs v. Jacobs, La., 74 So. 992.

77.——Licensee.—If boy playing football was making improper use of street, fact did not relieve persons driving automobile toward him of obligation to exercise due care, but, having seen him, they were bound to proceed with that measure of caution which a careful man who faced such situation would exercise.—Dervin v. Frenier, Vt., 100 Atl. 760.

78. **Parent and Child**—Support of Child.—Where wife, because of physical violence of her husband, was afraid to live with him in place to which he invited her, and refused to do so, her refusal was no "lawful excuse" for husband's failure to support their child, within the Non-support Act.—Donaghy v. State, Del., 100 Atl.

79. **Pledges**—Breach of Contract.—Where cotton was turned over to a bank as collateral, and was not to be sold before a certain date without defendant's order, and it was shipped by bank before that date, it was liable for its breach of contract.—Park v. Swann, Ga., 92 S. E. 398.

80. **Principal and Surety**—Release.—Surety on contractor's bond was not released or its liability reduced by owner's failure to notify it of contractor's failure to complete work, where owner, suing for amount of mechanic's liens he had paid, made no claim on ground of contractor's failure, and failure to notify was not prejudicial to surety.—Kildall Fish Co. v. Giguere, Minn., 162 N. W. 671.

81. **Railroads**—Imputable Negligence. — That passenger in automobile injured in collision with train at crossing was not driver of car did not relieve him from all care.—Blanchard v. Maine Cent. R. Co., Me., 100 Atl. 666.

82.——Licensee.—One not regularly employed by railroad company, who went to its yard office to obtain pass he had applied for, when he was not engaged in any duties, is at most mere licensee.—Illinois Cent. R. Co. v. Pierce's Adm'x, Ky., 194 S. W. 534.

83.——Negligence. — Railroad's negligence in failing to give crossing signal could not make it liable for death of automobile driver in collision, where he neglected to have car under control, and where by looking and listening at proper place he could have seen train in time to stop before collision.—Askey v. Chicago, B. & Q. R. Co., Neb., 162 N. W. 647.

84.——Presumption.—Where the undisputed evidence showed that plaintiff's mules were killed by a train, a presumption of negligence was raised.—Seaboard Air-Line Ry. Co. v. H. C. Moore & Son., Ga., 92 S. E. 388.

85.——Speed Ordinance.—In action by street railway for value of car destroyed by railroad train at junction of tracks of parties, ordinance fixing the speed of street cars in municipality is no evidence of reasonableness of an ordinance fixing speed of railway trains within such municipality.—Sioux Falls Traction System v. Great Northern Ry. Co., S. D., 162 N. W. 740.

86. **Sales** — Caveat Emptor. — Doctrine of caveat emptor applies to sale of potatoes by wholesaler to retail dealer in absence of deceit or misrepresentation.—Swank v. Battaglia, Ore., 164 Pac. 705.

87.——Evidence. — That woman bargaining with semi-professional dealer for mules was widow with small farm, dependent upon mules to make a crop, required dealer to use high degree of honesty and fairness.—Hudgings v. Burge, Mo., 194 S. W. 886.

88.——Nominal Damages. — In action for breach of warranty in sale of mule, where plaintiff introduced no evidence as to difference in value of mule at time of sale and its value had it been as warranted, he could recover only nominal damages.—Abraham Bros. v. Means, Ala., 75 So. 187.

89.——Rescission.—Where buyer retained a tractor nearly three years after knowing it was unsatisfactory, and that seller would make no further repairs, he cannot rescind.—Bancroft v. Emerson-Brantingham Implement Co., Tex., 194 S. W. 991.

90.——Warranty.—Where the contract of sale of a gin warranted the machine to perform what was claimed for it in the printed circulars, the language of the circulars was adopted and became the warranty of capacity.—Somerville v. Gullett Gin Co., Tenn., 14 S. W. 576.

91. **Shipping**—Contract.—Action of master of German steamship in seeking an American port when within 1,070 miles of England held not an actionable breach of obligation to transport gold from New York to such port and then to France, where master had received a wireless that war had broken out with England, France and Russia and to return to New York.—North German Lloyd v. Guaranty Trust Co., U. S. S. C., 37 S. Ct. 490.

92. **Street Railroads**—Continuing Negligence.—In action for decedent's death on street car track, regardless of statute, if proper fender would have saved life of deceased, its absence was continuing negligence, for which defendant company was liable.—Smith v. Charlotte Electric Ry. Co., N. C., 92 S. E. 382.

93. **Telegraphs and Telephones**—Burden of Proof.—Petition for failure of telegraph company to promptly transmit money, to enable plaintiff's daughter to come to his home, should show she would have come, had she received it, and that she could not get money elsewhere.—Western Union Telegraph Co. v. Melvin, Ky., 194 S. W. 563.

94.——Damages.—Exercise of honest judgment of telephone company's servants as to necessity of cutting shade tree branches did not relieve company from liability to owner of trees for any unlawful cutting.—Thompson v. Belmond Telephone Co., Ia., 162 N. W. 612.

95. **Trusts**—Action to Quiet Title.—Where defendant in suit to quiet title when receiving her deed had notice that grantor had nothing more than bare legal title, necessarily a title held in trust for plaintiff, who owned entire beneficial interest, defendant, if title vested in her at all, received it subject to trust and obligation to convey to plaintiff.—Prouty v. Rogers. Cal., 164 Pac. 901.

96. **Vendor and Purchaser**—Immoral Purpose.—Where defendant purchased property for immoral purposes, sale on foreclosure of trust deed was not an independent transaction, so as to make the sale valid.—Hall v. Edwards, Tex., 194 S. W. 674.

97.——Representation.—Where the timber and not the soil was to be conveyed, vendor's statement that two lots conveyed "were together, and he was selling them as one lot," was not a representation of physical contiguity of lots.—Abbott v. Fellows, Me., 100 Atl. 657.

98. **Wills**—Intention.—Under will providing for (1) payment of all just debts; (2) bequest to a son of $5,000; (3) bequest to a grandson of a special fund for his education; (4) disposing of the "remainder of my estate," etc.—intention of testator was to dispose of residue of estate after payment of items 1 and 2, and making provision for item 3.—Pearce v. Pearce, Ala., 74 So. 952.

99. **Waters and Water Courses**—Negligence.—In an action by consumer for injuries from typhoid germs in water supplied by a private water company, plaintiff to recover must prove: (1) That fever was contracted from use of water furnished by defendant; (2) that defendant was negligent in supplying contaminated water; (3) that plaintiff exercised due care.—Hamilton v. Madison Water Co., Me., 100 Atl. 659.

100. **Wills**—Tenant by Entireties. — Where husband and wife held realty as tenants by entireties and surviving wife, in ignorance of her rights, acquiesced in provisions of his will leaving her a life estate in certain of the realty, the will did not affect her right therein, and on her death a son was entitled to a child's share.—Flynn v. Parker, Pa., 100 Atl. 741.